(6)

No. 84-277

Office-Supreme Court, U.S.
FILED
[illegible] 26 1984
ALEXANDER L. STEVAS, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1984

BOARD OF TRUSTEES OF THE VILLAGE OF SCARSDALE, ET AL., PETITIONERS

v.

KATHLEEN S. MCCREARY, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING AFFIRMANCE

REX E. LEE
Solicitor General

RICHARD K. WILLARD
Acting Assistant Attorney General

PAUL M. BATOR
Deputy Solicitor General

MICHAEL W. MCCONNELL
Assistant to the Solicitor General

Department of Justice
Washington, D.C. 20530
(202) 633-2217

35 pp

QUESTIONS PRESENTED

1. Whether it would violate the Establishment Clause of the First Amendment for a local community to permit a group of private citizens, at their own expense, to display a nativity scene for a period of approximately two weeks during the Christmas holiday season in a small public park in the center of town.

2. Whether the court of appeals' judgment requiring the Village of Scarsdale to reconsider respondents' application without relying on the Establishment Clause as a basis for denial "compels" the Village to allow the nativity scene.

TABLE OF CONTENTS

	Page
Interest of the United States	1
Statement	3
Introduction and summary of argument	8
Argument	11
I. The Establishment Clause does not prohibit the government from permitting private citizens, at their own expense, to use public land for display of a nativity scene during the Christmas holiday season	11
A. The use of public land by private citizens, on a neutral basis, for symbolic expression of a religious or political nature does not imply government endorsement of their point of view	11
B. That display of the privately-sponsored nativity scene here is permissible follows a fortiori from this Court's approval of a government-sponsored nativity scene in *Lynch* v. *Donnelly*	13
1. Public and private land	14
2. Context	16
3. Divisiveness	17
4. Official secular purpose	18
II. The judgment of the court of appeals leaves the Village free to adopt neutral rules under which it could either permit or exclude respondents' creche	19
A. Petitioners mischaracterize the opinion and judgment of the court of appeals; the court did not "compel" the Village to authorize display of a creche in Boniface Circle	19

Argument—Continued: Page

B. Under the judgment below, the Village may adopt neutral rules that might, or might not, exclude respondents' creche 21

C. Neutral rules for the use of Boniface Circle would protect the Village's legitimate interests without discriminating against religious or other controversial speech 24

Conclusion 28

TABLE OF AUTHORITIES

Cases:

Allen v. *Morton*, 495 F.2d 65 .....3, 9, 11
Bender v. *Williamsport Area School District*, 741 F.2d 538, petition for cert. pending, No. 84-773.. 21
Cantwell v. *Connecticut*, 310 U.S. 296 26
Clark v. *Community for Creative Non-Violence*, No. 82-1998 (June 29, 1984) 2, 13, 23
FCC v. *League of Women Voters*, No. 82-912 (July 2, 1984) 12
Fowler v. *Rhode Island*, 345 U.S. 67 26
Hague v. *CIO*, 307 U.S. 496 ..... 12, 24
Heffron v. *International Society for Krishna Consciousness, Inc.*, 452 U.S. 640 27
Lynch v. *Donnelly*, No. 82-1256 (Mar. 5, 1984) ....*passim*
McDaniel v. *Paty*, 435 U.S. 618 ..... 25, 27
Members of the City Council v. *Taxpayers For Vincent*, No. 82-975 (May 15, 1984) 22
Mueller v. *Allen*, No. 82-195 (June 29, 1983)..... 17
Niemotko v. *Maryland*, 340 U.S. 268 .....5, 13, 27
O'Hair v. *Andrus*, 613 F.2d 931 .....11, 12, 13
Widmar v. *Vincent*, 454 U.S. 263 .....6, 7, 21, 25, 27

Constitution and regulations:

U.S. Const.:

Amend. I 1, 3, 9, 12, 13, 25
Establishment Clause .....*passim*
Free Exercise Clause 5, 27
Free Speech Clause 1, 5, 21, 27

Constitution and regulations—Continued: Page

Amend. V (Equal Protection Clause) 27
Amend. XIV (Equal Protection Clause)..... 5, 27

36 C.F.R:

Section 50.19 1
Section 50.19(a) 2
Section 50.19(b)(1) 2
Section 50.19(d) 2
Section 50.19(d)(8) 2
Section 50.19(d)(8)(v) 2

In the Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-277

BOARD OF TRUSTEES OF THE VILLAGE OF SCARSDALE, ET AL., PETITIONERS

v.

KATHLEEN S. MCCREARY, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING AFFIRMANCE

INTEREST OF THE UNITED STATES

This case involves two issues of law under the First Amendment. First, does the Establishment Clause *prohibit* the government from permitting private individuals to erect and maintain a stationary religious symbol in a public park, at their own expense, in connection with a religious holiday? Second, does the Free Speech Clause *require* the government to permit erection of such a structure under the circumstance of this case? Both issues directly affect the United States in its capacity as owner of national parks.

National Park Service regulations, 36 C.F.R. 50.19, allow individuals or groups to conduct demonstrations ("demonstrations, picketing, speechmaking,

marching, holding vigils or religious services and all other like forms of conduct which involve the communication or expression of views" (36 C.F.R. 50.19 (a)) in the national parks, and to erect "temporary structures" in connection with such demonstrations "for the purpose of symbolizing a message or meeting logistical needs." 36 C.F.R. 50.19(d)(8); see *Clark* v. *Community for Creative Non-Violence*, No. 82-1998 (June 29, 1984), slip op. 3. A permit is required for any demonstration involving more than 25 participants or a temporary structure (other than small lecturns or speaker platforms). 36 C.F.R. 50.19(b)(1) and (d)(8)(v). No distinction is made on the basis of the religious, political, or other content of the demonstrations; conflicting applications are granted on a first-come, first-served basis. 36 C.F.R. 50.19(d).

For approximately six and eleven years, respectively, the National Park Service has granted demonstration permits to private groups to erect and maintain, for a several week period during the holiday season, a menorah in Lafayette Park directly across Pennsylvania Avenue from the White House, and a nativity scene on the east panel of the Ellipse. Like petitioners' description of the nativity scene in the instant case, both of these symbols are on public land in prominent locations (cf. Pet. Br. 41-42) and are displayed standing alone, with no immediate secular context (cf. Pet. Br. 42-44). Adoption by this Court of petitioners' argument might well call into question this neutral and established federal practice.[1]

[1] The National Park Service recently decided to include a privately-owned nativity scene in this year's annual government-sponsored Christmas Pageant for Peace, which takes place on public park land (the Ellipse) immediately south of the White House. The practice of including a nativity scene in the Pageant was discontinued in 1973, as a result of *Allen* v. *Morton*, 495 F.2d 65 (D.C. Cir. 1973). We do not believe that the Court's resolution of the instant case is likely to affect the Park Services's decision, which is similar in most relevant respects to the display by the City of Pawtucket of a nativity scene in its annual Christmas celebration, upheld in *Lynch* v. *Donnelly*, No. 82-1256 (Mar. 5, 1984).

Petitioners also contend that the court of appeals' judgment has "compelled" the Village "to allow placement" of a nativity scene in a small public park in the center of town (Pet. Br. i). As to this issue, the United States also has a substantial interest. Although, as noted, Park Service regulations generally allow individuals and groups to erect "temporary structures" (such as creches and menorahs) in connection with permitted demonstrations on public park land, we would share petitioners' concern about a *constitutional* rule that would compel the government to allow unattended structures in any location that is otherwise deemed a forum for First Amendment activity.

STATEMENT

1. From 1957 through 1980, the Village of Scarsdale granted the request of a private group ("the Scarsdale Creche Committee") to place a nativity scene in Boniface Circle, a small park in the center of town. The cost of the creche was borne entirely by the Committee, with the exception of electricity for a light bulb in some past years. During the last five years of this period, the Committee was required, as a condition to displaying the creche, to post a sign beside it stating: "This creche has been erected and maintained solely by the Scarsdale

Creche Committee, a private organization" (Pet. App. 34a).

The district court opinion recounts in some detail the other uses of Boniface Circle and other Scarsdale parks by private groups from approximately 1960 to the present. See Pet. App. 28a-29a, 43a-45a. In brief, "most applications for access to Boniface Circle have been denied" (*id.* at 43a (footnote omitted)), usually for reasons related to shopping, traffic, parking, or safety, or for no reason at all; once because of the character of the park as a "War Memorial" (*ibid.*). Other activities that have been allowed in the park include, in addition to Fourth of July and Memorial Day celebrations, only the following: a carnival in connection with the American Field Service Work Day, a kick-off for the Community Fund Drive, and a Christmas Carol Sing sponsored by the Town Club (*id.* at 44a). None of these uses of Boniface Circle involved unattended structures,[2] although unattended symbolic structures have been permitted on public property elsewhere in the Village.

In 1981 and years following, the Village Board of Trustees voted to deny permission for display of the creche on Boniface Circle. The reason for the denial, according to the district court (Pet. App. 46a (emphasis in original)), was the Trustees' belief that "because the symbol was religious it should not be on *any* public land." The court did not specify whether this belief was based on an interpretation of the Establishment Clause or on a general fear that religious symbols on public land would "generate discord in the community" (Pet. App. 46a). Petitioners state that it was both (Pet. Br. 8 (citing minutes of the Board of Trustees)).

[2] The record shows that the Board of Trustees even denied an application by the Red Cross to erect a symbol in Boniface Circle, stating that "it would set a precedent and requests from similar organizations could not reasonably be denied" (Pet. App. 43a n.8).

2. Following denial of the 1982 application, respondents, two private groups that desired to display a nativity scene in Boniface Circle,[3] filed suit in United States District Court for the Southern District of New York, contending that petitioners' denial of their applications violated their rights under the Free Speech and Free Exercise Clauses of the First Amendment, and the Equal Protection Clause of the Fourteenth . Pet. App. 27a.

The district court held that Boniface Circle is a "traditional public forum" (Pet. App. 42a) and that the Village's denial of respondents' applications was "content-based"—that is, that the denial was based on the religious character of the proposed display. *Id.* at 46a-47a. The court also held "that the denial could not be upheld as a time, place or manner restriction even if it were content-neutral because it was not issued pursuant to narrowly tailored regulations." *Id.* at 47a (footnote omitted) (citing *Niemotko* v. *Maryland*, 340 U.S. 268 (1951)).[4] However, the district court then held (three months before this Court's decision in *Lynch* v. *Donnelly*, No. 82-1256 (Mar. 5, 1984), that the Village's action in bar-

[3] Although there are two separate groups of respondents, they desire to display only one creche. The "Citizens Group" has stated that it would withdraw its application if the "Scarsdale Creche Committee" is again authorized to display its creche. Citizens Group Br. in Opp. 5 n.2.

[4] The district court rejected respondents' free exercise and equal protection claims. Pet. App. 39a, 60a.

ring the creche was justified by the "compelling state interest" of avoiding violation of the Establishment Clause. Pet. App. 47a; cf. *Widmar* v. *Vincent*, 454 U.S. 263, 270-276 (1981).

The district court acknowledged that allowing placement of the nativity scene would have the legitimate secular purpose of "providing equal access to a public forum" (Pet. App. 51a), and that "entanglement" problems would be insufficient to create an Establishment Clause violation (*id.* at 53a).[5] However, the court reasoned that allowing placement of the creche would violate the Establishment Clause because it would have the primary effect of advancing religion. Unlike religious activities by individuals (such as rallies, sermons, leafletting, or the like), which would be permissible on Boniface Circle (Pet. App. 53a), the placement of an unattended symbol on public land converts the public property from being "just a place from which a message can be proclaimed" to being the actual "message bearer" (*id.* at 55a). Moreover, the court reasoned (*id.* at 56a), in the absence of "persons present to whom the receiver of the religious message can attribute the speech," the possibility is enhanced that the observers "will assume it is supported by the state." The court concluded (*id.* at 61a (emphasis and brackets in original; citations omitted)):

> The line we have drawn allows persons with religious views unfettered freedom to come onto public forum property to *personally* speak those

[5] The court noted that the government would be involved with religion if it granted the applications of religious groups, and also if it were required to determine whether symbols are "religious" for purposes of excluding them. Pet. App. 52a.

> views. We also think it would give them the unimpeded right, subject of course to reasonable time, place and manner restrictions, to bring religious symbols with them. * * * And, we think, it draws a boundary which does not question the right of religion to receive "general [governmental] benefits," but which does allow government not to be "joined" in the promotion of religion.

3. The court of appeals reversed the district court's holding that allowing the nativity scene would violate the Establishment Clause. In reliance on *Lynch* v. *Donnelly*, *supra*, and *Widmar* v. *Vincent*, *supra*, the court of appeals held that to permit a private group to display a creche on public property would not constitute an endorsement of religion. The court "t[ook] care to emphasize the narrowness of [its] ruling," (Pet. App. 24a), stating (*ibid.*):

> we * * * hold only that the Village would not contravene the establishment clause by allowing the display of a creche at Boniface Circle, a traditional public forum, for a period of approximately two weeks during the Christmas holiday season.

The judgment of the court did not compel the Village to grant permission for respondents to put on their display. Rather, the court of appeals remanded to the district court "for the entry of an injunction prohibiting the Village from relying on the establishment clause as a reason for prohibiting the erection of a creche at Boniface Circle" (*id.* at 25a). The court's opinion stressed that its judgment "does not affect the ability of the Village to establish reasonable time, place and manner restrictions regarding

the use of its public properties, including Boniface Circle" (*ibid.*).[6]

INTRODUCTION AND SUMMARY OF ARGUMENT

The most striking aspect of this case is that both sides in the dispute believe that the Constitution (the very same Amendment) not just permits, but compels, the Village of Scarsdale to accept their substantive positions, and deprives the community of all discretion to determine whether or not a private group should be allowed to maintain a creche in Boniface Circle during the Christmas season. Petitioners believe that the Constitution *prohibits* the Village from allowing the creche; respondents believe that the Constitution *requires* the Village to allow it.

A false dilemma has thus been created. The district court began with the premise that, because Boniface Circle is in some ways a "traditional public forum," it follows that respondents have a constitutional right to erect and maintain a structure in that place, unrelated to any actual speech, religious service, or demonstration by individual persons. The court expressly rejected the idea that exclusion of this structure might be justified on the basis of reasonable time, place, or manner regulations. Having thus truncated the Village's discretion to control its property on the one side of the balance, the district court then proceeded to hold that the Village also lacks the discretion to permit an unattended religious symbol on public land. Only because allowing the

[6] The court of appeals also remanded for the purpose of "action regarding a disclaimer sign or signs" and for "other such action as is consistent with [its] determination." Pet. App. 25a.

nativity scene is forbidden, the court reasoned, is it not required.

We submit that the Establishment Clause does not bar the government from granting access to private citizens for erection of a temporary religious holiday symbol, so long as no religious favoritism or discrimination is involved. This was the position of the federal courts even before *Lynch* v. *Donnelly*, *supra*. See *Allen* v. *Morton*, 495 F.2d 65 (D.C. Cir. 1973). The federal government has followed this approach for ten years, without legal challenge or even formal complaint. Now that this Court, in *Lynch*, has upheld the right of a community to include a nativity scene in a *government-sponsored* Christmas celebration, it is beyond question that neutral accommodation of private groups on public land would also be permissible.

But we submit that it does not follow that the Village of Scarsdale and like governments (including the United States in its capacity as owner of park land) are compelled to grant permission to private persons to erect religious—or any other—symbols, to be displayed, unattended, on any parcel of public land that is available for other forms of First Amendment activity. Nor did the court of appeals so hold.

Contrary to repeated assertions of petitioners (Pet. Br. i, 13, 14, 15, 16, 25, 35, 40, 41, 47, 48), the court of appeals did not "compel," "require," "order," or "command" the Village to grant permission for the creche on Boniface Circle. On the contrary, the court "h[e]ld only that the Village would not contravene the Establishment Clause by allowing the display of a creche at Boniface Circle" (Pet. App. 24a) and expressly observed that the Village could

enforce reasonable time, place, and manner restrictions, as long as these are not content-based (*id.* at 25a). We believe that a neutral distinction between unattended structures and actual speech activities by individuals should be sustained in the context of this small park in the center of town.

A simple affirmance of the narrow holding of the court of appeals would break the false dilemma created by the district court below. The Village has ample discretion under the Constitution to adopt neutral policies for the use of its park, and thereby either to permit or to exclude nativity scenes and similar unattended structures. Reasonable latitude to make these sensitive decisions, of intensely local concern, should be left in the hands of the Village Board of Trustees, which is better able than litigators and courts to forge a locally acceptable solution that accommodates the feelings and interests of the Village citizenry.

ARGUMENT

I. THE ESTABLISHMENT CLAUSE DOES NOT PROHIBIT THE GOVERNMENT FROM PERMITTING PRIVATE CITIZENS, AT THEIR OWN EXPENSE, TO USE PUBLIC LAND FOR DISPLAY OF A NATIVITY SCENE DURING THE CHRISTMAS HOLIDAY SEASON

A. The Use Of Public Land By Private Citizens, On A Neutral Basis, For Symbolic Expression Of A Religious Or Political Nature Does Not Imply Government Endorsement Of Their Point Of View

Even before *Lynch* v. *Donnelly*, No. 82-1256 (Mar. 5, 1984), the federal courts recognized the right of individuals and groups, on a neutral and nondiscriminatory basis, to erect and display nativity scenes and similar religious holiday symbols, on a temporary basis and at their own expense, on public land. *Allen* v. *Morton*, 495 F.2d 65 (D.C. Cir. 1973). Judge Leventhal, concurring in *Allen*, stated that "the Government could avoid all Establishment issues" by treating private organizations that desire to display a creche on public land "like any other applicant for use of parkland" (*id.* at 90).[7] See also *O'Hair* v. *Andrus*, 613 F.2d 931 (D.C. Cir. 1979) (upholding a

---

[7] The court in *Allen* v. *Morton, supra,* held that government involvement with a nativity scene in the government-sponsored Christmas Pageant for Peace violated the Establishment Clause. In this respect, we believe that *Allen* was effectively overruled by *Lynch* v. *Donnelly, supra.* However, neither in *Allen* nor in any other litigation of which we are aware, until the district court decision below, has it been held that the government is barred by the Establishment Clause from granting permission to a bona fide private group, on neutral terms, to use public land for the temporary display of a religious symbol during the religious holiday season.

National Park Service decision to permit performance of a Papal Mass on the National Mall).

The underlying principle here is that activities on public land are not, and are not generally perceived to be, actions of the government. *O'Hair* v. *Andrus*, 613 F.2d at 934 (when a public park "is, as a matter of established policy, openly available on a non-discriminatory basis * * * to [all comers] (religionists and anti-religionists), there is no 'establishment of religion,' and there cannot be a meaningful perception of one"). Public parks have been used "time out of mind" for purposes of assembly, protest, and communication (*Hague* v. *CIO*, 307 U.S. 496, 515 (1939) (Roberts, J.)); it has never been thought necessary to limit the rights of the people to free speech and assembly on public land merely because some other persons might mistake their activities for government endorsement of a particular point of view.[8] Nor does "the First Amendment protection against forced support or affirmation of repugnant ideas" (Pet. Br. 34) apply to use of public land by individuals for the expression of ideas (however repugnant). Citizens of a town plainly have no First Amendment right—as petitioners contend (Pet. Br. 35)—to prevent speakers with whom they disagree from exercising equal rights of speech and assembly on public land.

In these respects, religious communications are no different from any others. Religious speakers, no less than others, may use public land for the communi-

[8] Cf. *FCC* v. *League of Women Voters*, No. 82-912 (July 2, 1984) (restrictions on editorializing by federally-subsidized public broadcasters held unconstitutional despite Congress's intention "to avoid the apearance of government sponsorship of a particular view or a particular political candidate" (slip op. 6 (Rehnquist, J., dissenting)).

cation of ideas. *Niemotko* v. *Maryland*, 340 U.S. 268 (1951); *O'Hair* v. *Andrus*, *supra*. It is inherently no more likely that a privately-placed creche on public property will be viewed as a government endorsement of religion than that a collection of tents in Lafayette Park, called "Reaganville II" and designed to protest the plight of the homeless (see *Clark* v. *Community for Creative Non-Violence*, No. 82-1998 (June 29, 1984)), would be so confused. But even if it were, the potential for such misunderstanding would not justify exclusion of religious expression from forums otherwise open to all.

To accept petitioners' premise that religious (and other forms of controversial) symbolic speech must be excluded from public parks because of the danger that some observers may infer a government endorsement of the message would convulse modern First Amendment law. It would mean—as petitioners' brief intimates (Br. 19)—that the only ideas that could be communicated on public land are orthodox ideas: those "wrapped in the shared and approving sentiments of the community" (*ibid.*). It would necessitate close administrative and jurisprudential discriminations among forms of symbolic speech, on an essentially standardless basis. We submit that content-neutral rules regarding use of public parks are the best guarantee of First Amendment rights. No special rules are required for nativity scenes or other religious or controversial symbols.

B. That Display Of The Privately-Sponsored Nativity Scene Here Is Permissible Follows A Fortiori From This Court's Approval Of A Government-Sponsored Nativity Scene In *Lynch* v. *Donnelly*

Last Term, in *Lynch* v. *Donnelly*, *supra*, this Court held that a government-owned and sponsored display of a nativity scene, as part of a general holiday cele-

bration, did not violate the Establishment Clause. We believe that decision is controlling here; indeed, the instant case follows a fortiori from the decision in *Lynch*.

Here, unlike in *Lynch*, the nativity scene is privately owned; there is no government sponsorship whatsoever. Whatever concerns there might be that the *government's* display of a creche may communicate a message of endorsement of the Christian religion (see *Lynch*, slip. op. 3-8 (O'Connor, J., concurring)) are absent when the government has played no part (other than to grant permission) in its display. This point is particularly clear here because the creche is accompanied by a sign informing observers that the scene is "erected and maintained solely by * * * a private organization" (Pet. App. 8a)—a safeguard not usually provided in connection with private expression on public land. There is, therefore, far less cause for concern here than there was in *Lynch*.

Petitioners have attempted (Br. 41-47) to distinguish the decision in *Lynch* on four grounds: (1) that the creche at issue in *Lynch* was on private land, while the land here is public; (2) that the Pawtucket creche was part of a larger Christmas display, while the creche here is displayed alone; (3) that the creche display here has engendered actual political divisiveness; and (4) that the Pawtucket officials asserted a secular purpose for their creche display, while the Scarsdale officials here have asserted none. None of these is persuasive.

1. *Public And Private Land.* Petitioners contend that it is significant that the nativity scene at issue here would be displayed on public park land, while the scene in *Lynch* was on private property. However, the opinion for the Court in *Lynch* did not rely in any fashion on the happenstance that the Pawtucket Christmas display was on private land. The Court treated the case, quite properly, as one in which the government was responsible for, and identified with, the display. Moreover, the Court analogized the case to other situations in which acknowledgements of religion take place on public property. Slip op. 16. Considering the full circumstances of the two cases, it cannot seriously be argued that there is greater government involvement with (or appearance of government support for the religious message of) the privately owned nativity scene in Boniface Circle than with the creche in *Lynch*, which was "purchased, erected, displayed, sponsored and owned" by the government (Pet. App. 19a).[9]

[9] Petitioners repeatedly state (Br. 7, 13, 17-18, 21, 32, 42, 45) that respondents' reason for wishing to display the creche in Boniface Circle, rather than on private land, is to create "the appearance of endorsement, an 'aura' of public support" (*id.* at 13) for their religious message. The sole basis for this charge is a statement by the Creche Committee that it did not choose to display the creche on the property of various churches, in rotation, because this would undermine the creche's "ecumenical aspect" (Pet. App. 37a). It seems to us altogether understandable that a multi-faith committee would prefer not to display its nativity scene on the property of a church, where it would appear to belong to *that* church. This is a far cry from attempting to create the impression of government support for their religious views.

In a larger sense, we are concerned that petitioners and the district court have distorted the "purpose" and "effect" inquiries under the Establishment Clause. The important point is that the *government* remain neutral; there is no call for judicial examination into the motives and reasons of private groups desiring to use public park land. The right of the people to use public parks for expressive activity does not

2. *Context.* Petitioners attempt to distinguish *Lynch* on the ground that "[t]he Scarsdale creche has always been presented and displayed standing by itself in Boniface Circle," while the Pawtucket creche was part of a Christmas display including, inter alia, a Santa Claus house, reindeer pulling Santa's sleigh, carolers, a Christmas tree, and a talking wishing well (Pet. Br. 42-43). The court of appeals correctly rejected this purported distinction (Pet. App. 22a-23a).

The contextual distinction drawn by petitioners is one of degree, not of kind. As the court of appeals pointed out (Pet. App. 23a), the Scarsdale creche should be viewed not in isolation, but in the context of the "many traditional symbols of Christmas" decorating other parts of the Village, including Christmas lights and decorations, provided by the Chamber of Commerce, in Boniface Circle itself. Further, as the court of appeals also pointed out (Pet. App. 23a), this Court was concerned less with the particulars of the specific Christmas display in *Lynch* than with the overall "context of the Christmas season" (*Lynch*, slip op. 9). The point is that displaying a traditional symbol of a holiday—even if religious in origin and meaning—does not amount to an endorsement of the religious faith; it is simply a traditional acknowledgement that the holiday is in part a religious holiday.

Petitioners trivialize *Lynch* by claiming that the absence of a cut-out clown, reindeer, or talking wishing well must dictate a different result. The federal courts have more important matters to decide than

---

depend upon what are their reasons for not using private land for the same purpose. The court of appeals quite properly treated this line of argument as irrelevant (Pet. Br. 13).

the significance of marginal differences in holiday displays—especially those erected by private individuals.

3. *Divisiveness.* Petitioners attempt to distinguish *Lynch* on the ground that there has been "actual and severe, not merely potential" divisiveness in Scarsdale over the matter of the creche (Pet. Br. 44). However, in this case as in *Lynch*, and for the same reasons, "no inquiry into potential political divisiveness is even called for" (*Lynch*, slip op. 14). See also *Mueller* v. *Allen*, No. 82-195 (June 29, 1983), slip op. 14-15 n.11. Indeed, in the context of *private* applications for use of public land, the government has an affirmative obligation to protect unpopular speakers, even if their presence on public land is "divisive." In any event, it seems virtually certain that neutral rules for the use of Boniface Circle, such as are permitted under the judgment below (see pages 21-24, *infra*) would more effectively dampen controversy over this issue than would excluding the nativity scene because of its religious message.[10]

---

[10] The circumstances of this case provide further support, if any is needed, for the wisdom of this Court's decision not to treat "political divisiveness" as a separate ground for invalidation of practices of this sort. From the beginning of the Scarsdale creche display, the Village leaders have been sensitive to the concerns of the community over the display, forming committees to meet with persons of differing views and entertaining recommendations about how best to handle the matter. See Pet. App. 31a-32a. Until the late 1970s, the Board of Trustees was unanimous in its decisions regarding the creche. In 1976, a resident filed suit, unsuccessfully, to bar the creche (*id.* at 32a), and from that point on, the controversy became both more legal and more contentious.

We can agree that one of the purposes of the Establishment Clause was to defuse religious divisiveness in the political

4. *Official Secular Purpose.* Petitioners observe (Br. 46) that in *Lynch* the Pawtucket officials defended their decision to sponsor a nativity scene on the basis of legitimate secular objectives; here, the Scarsdale officials neither assert nor acknowledge any such purpose. But this is attributable solely to the fact that the Village officials here are opposed to display of the creche. Government officials attempting to justify content-based discriminations among forms of symbolic speech on the ground that to allow religious expression would violate the Establishment Clause should not be allowed to prove their point simply by failing to assert a secular purpose.

Plainly—whether Village officials have asserted it or not—there is a legitimate secular purpose to allowing respondents access to Boniface Circle. Both the district court (Pet. App. 51a) and the court of appeals (*id.* at 16a) so found. To allow citizens to express themselves expands the scope of free expression and communication of ideas; to permit holiday displays promotes the spirit of the season.

---

arena; it is not clear that that objective is furthered by removing local disputes to the federal courts and escalating them into constitutional contests. A constitutional rule that opponents of a government decision are entitled to overturn the majority will in the courts, provided there is sufficient "divisiveness" over the decision, would have the effect of stimulating divisiveness, not of reducing it.

II. THE JUDGMENT OF THE COURT OF APPEALS LEAVES THE VILLAGE FREE TO ADOPT NEUTRAL RULES UNDER WHICH IT COULD EITHER PERMIT OR EXCLUDE RESPONDENTS' CRECHE

A. Petitioners Mischaracterize The Opinion And Judgment Of The Court Of Appeals; The Court Did Not "Compel" The Village To Authorize Display Of A Creche In Boniface Circle

Petitioners' first question presented (Br. i) is whether a municipal governing board should be "compelled" to allow placement of a creche in a public park for the two-week Christmas season. They repeat this formulation, with some variation, numerous times in their brief. See Pet. Br. 13, 14, 15, 16, 25, 35, 40, 41, 47, 48. At pages 40-41, they purport to summarize the court of appeals' opinion in three points, the third one of which is (*id.* at 41 (emphasis in original)):

> (iii) Therefore, since Pawtucket's officials were *allowed* in *Lynch* to display a creche, Scarsdale's Trustees are *compelled* under *Widmar* to permit one in Boniface Circle.

This mischaracterizes the court of appeals' judgment and opinion; nowhere in petitioners' brief is the court's actual holding or judgment quoted, or even mentioned. The court's holding is stated at Pet. App. 24a:

> we take care to emphasize the narrowness of our ruling and hold only that the Village would not contravene the establishment clause by allowing the display of a creche at Boniface Circle, a traditional public forum, for a period of approximately two weeks during the Christmas holiday season.

The court's judgment is stated at Pet. App. 25a:

> We remand for entry of an injunction prohibiting the Village from relying on the establishment clause as a reason for prohibiting the erection of a creche at Boniface Circle, a traditional public forum, for a period of approximately two weeks during the Christmas holiday season; for action regarding a disclaimer sign or signs; and for other such action as is consistent with our determination herein.

The court emphasized, also, that the "problem" with the Village's position was only that the prohibition was "content-based," and that its ruling "does not affect the ability of the Village to establish reasonable time, place and manner restrictions regarding the use of its public properties, including Boniface Circle" (*id.* at 24a-25a).[11] In light of this holding and judgment, it is apparent that petitioners have misstated the question presented. The court of appeals did not "compel" the Village to permit the creche on Boniface Circle, but merely required that the Village consider respondents' application without relying on an erroneous legal ground for denial. It is on this basis that we urge affirmance of the judgment below.

---

[11] The court of appeals thus rejected the district court's erroneous holding (Pet. App. 47a) that the Village could not defend its decisions on the basis of reasonable time, place, or manner restrictions because the Village had not promulgated "narrowly tailored regulations." A local community is not required to promulgate regulations for the governance of its affairs; it may proceed on a case-by-case basis, provided its decisions are not standardless and are in furtherance of legitimate governmental interests.

B. Under The Judgment Below, The Village May Adopt Neutral Rules That Might, Or Might Not, Exclude Respondents' Creche

Under the judgment of the court of appeals, the Village is free to adopt neutral rules to govern use of Boniface Circle for expressive activities or symbolic speech. Petitioners would be able to make precisely the distinction—between live speech and unattended structures—that they have contended is central to this case (see Pet. Br. 27-31). This commonsense distinction need not be made mandatory on all governments (under either Establishment or Free Speech Clauses); the Village of Scarsdale can, if it chooses, adopt the distinction of its own accord and discretion.

In this respect, we agree with petitioners that *Widmar* v. *Vincent*, *supra*, is not on all fours with this case. In *Widmar*, there was no content-neutral distinction that could be drawn between the activities of the student plaintiffs and the activities of other student groups permitted to meet. The students sought equal treatment within the very terms established by the University to govern the forum. In the absence of an Establishment Clause justification for forbidding religious speech on campus in *Widmar*, therefore, the University was wholly without a reason to disallow it.[12] Here, in contrast, the "speech"—

---

[12] This case is also distinguishable from *Bender* v. *Williamsport Area School District*, 741 F.2d 538 (3d Cir. 1984), petition for cert. pending, No. 84-773, for the same reason. In *Bender*, unlike this case, the school officials asserted no reason for denying access to a student religious club other than their lawyers' opinion that to do so would violate the Establishment Clause. See Br. for the U.S. as Amicus Curiae, *Bender* v. *Williamsport Area School District*, No. 84-773. A copy of that brief has been provided to counsel for the parties in the instant case.

display of a creche—is different in kind from any other form of speech permitted by the Village in Boniface Circle. The Creche Committee is the only group ever permitted by Scarsdale to maintain an unattended structure on Boniface Circle for any extended period of time. If the Village chooses to adopt neutral rules that would have the effect of excluding the creche—along with all comparable unattended symbols—from the park, we believe it should be allowed to do so.[13]

A distinction between the live speech activities of individuals and the placement of unattended symbols in a small, open, and uncluttered park like Boniface Circle is surely sustainable as a reasonable time, place, and manner restriction. In *Members of the City Council* v. *Taxpayers For Vincent*, No. 82-975 (May 15, 1984), slip op. 19, this Court distinguished between circumstances in which "individual citizens were actively exercising their right to communicate directly with potential recipients of their message," where the expressive "conduct continued only while the speakers or distributors remained on the scene," and the circumstances of that case, where the petitioners sought to post "temporary signs throughout an area where they would remain unattended until

[13] The Board of Trustees has permitted unattended symbols and structures to be displayed on other public property in the village (Pet. App. 4a), and respondents have indicated their willingness to display the nativity scene in an alternative location (*id.* at 47a & n.12). Given this history, it is apparent that an exclusion of unattended symbols from *all* Village land might be less desirable to the Village and more difficult to sustain as a reasonable time, place, or manner regulation. It is therefore possible that, upon remand and reconsideration of respondents' application by the Board, an agreeable site for the creche, away from Boniface Circle, may be found.

removed." See also *Clark* v. *Community for Creative Non-Violence*, slip op. 8 ("we seriously doubt that the First Amendment requires the Park Service to permit a demonstration * * * involving a 24-hour vigil and the erection of tents to accommodate 150 people").

Such a distinction would serve governmental interests in two important respects, and thus should be sustained in this context as a reasonable time, place, or manner regulation. First, an unattended structure monopolizes space in a way that live people do not; it sits there, unmoving, for as long as it is permitted. This interferes with other potential uses of the park and also injures the park's appearance. Live speakers tend to be more temporary and tend to move about; they are less likely to "appropriate" space for their own exclusive use for an extended period of time. Second, in the absence of individuals engaging in expressive conduct, a fixed, unattended structure may in some contexts be more likely to be viewed as communicating the government's own views. As the district court observed (Pet. App. 56a), if "there are no persons present to whom the receiver of the * * * message can attribute the speech, the possibility that those receiving the message will assume it is supported by the state is particularly present." The government's legitimate interest in maintaining an appearance—as well as the reality—of neutrality may therefore be advanced by such a distinction.

We agree with petitioners (Br. 27-31) that classification of a parcel of public property as a "public forum" does not end the analysis; the further question is what are reasonable terms for the use of the forum. Although parks, streets, and sidewalks are presumptively "public forums" for certain traditional

activities (speaking, leafletting, or soliciting by individuals) (*Hague* v. *CIO*, *supra*), they should not therefore be considered open for uses that are incompatible with their basic character. No one would suggest that there is a right to erect a billboard in Central Park or to stage a rally in a bird sanctuary. The best indicator of the limits that may reasonably be imposed on access to the forum—in the absence of written policies—are the actual character and historical uses of the location.

Boniface Circle is a small park, with traffic and safety problems, unsuitable for many forms of activity involving crowds or movements of people. The record clearly shows that most requests by private groups to use the park have been denied, for a variety of reasons or for no reason at all. The fact that no private group (other than the Creche Committee) has ever been granted the right to erect and maintain an unattended structure in Boniface Circle for any extended period of time stands as a powerful reason to support the reasonableness and neutrality of a policy barring all unattended structures.

C. Neutral Rules For The Use Of Boniface Circle Would Protect The Village's Legitimate Interests Without Discriminating Against Religious Or Other Controversial Speech

Petitioners begin the discussion (Br. 16) of their argument against being "compelled" to allow the creche with the observation that this issue is one of First Amendment law generally, and only incidentally of the Establishment Clause. This is because petitioners' interests are essentially unrelated to the *religious* character of the proposed display; the Village is equally concerned about other fixed, unat-

tended symbols or structures. As petitioners express the point (Br. 16), the court's analysis

> has resulted in a ruling that today compels [*sic*] the Village to allow a Nativity scene to stand in a park at the Village center, and tomorrow, on the same free speech principle, will compel a place for a swastika, a hammer and sickle, vulgar signs and comparable varieties of symbolic 'speech.'

See also *id.* at 14, 24, 30, 31.

This suggests that the answer to petitioners' perceived problem is not to be found in the Establishment Clause. Even if they were correct that the Establishment Clause prohibits the display of religious symbols of this sort, petitioners would still face the problem of unattended swastikas, hammer and sickles, burning crosses, and so forth. This case does not, therefore, require the Court to grapple with the difficult question of whether the government is ever justified in treating religious expression differently from other forms of expression in order to preserve an appearance of separation of church and state in excess of that required by the Establishment Clause. Pet. Br. 37-39, 47-48; see *Widmar* v. *Vincent*, 454 U.S. at 276; *McDaniel* v. *Paty*, 435 U.S. 618 (1978).

We submit that, under the court of appeals' judgment, neutral rules for the use of Boniface Circle can fully vindicate the Village's legitimate interests.[14]

---

[14] To the extent that the Village's interest is in being able to discriminate against some forms of speech within Boniface Circle because of their "controversial," "unsuitable," "repugnant," "objectionable," "contentious," or "hateful" character in the eyes of the majority (see Pet. Br. 14, 16, 19, 20, 25 & n.17, 26, 30, 31, 33, 34 & n.22, 35), that interest cannot constitutionally be vindicated, for it runs counter to First Amendment principles applicable to a public forum.

An evenhanded distinction between unattended structures and live forms of expressive activity would enable petitioners to protect each of the legitimate Village interests they assert in their brief, without the need for discrimination against religious speech. See Pet. Br. 14, 31-39. Since petitioners have acknowledged that it is only the presence of unattended symbols that creates, in their view, an appearance of governmental support for the symbolic message (*id.* at 25, 28) such a distinction would enable the Village to avoid coerced support for sectarian activities (*id.* at 14, 32-35). It would enable the Village to avoid "favoritism, or the appearance of favoritism, toward one sectarian position" (*id.* at 14, 35-37); indeed, neutral rules would perform this function far better than would petitioners' own position that religious speech can be singled out for different—*i.e.*, disfavored—treatment. The same holds true for petitioners' professed interest (*id.* at 14, 37-39) in "steering clear of an Establishment Clause violation in 'letter or spirit.'" Attempting to decide which symbols are "religious"—and which are "wrapped in the shared and approving sentiments of the community" (*id.* at 19)—would entangle the Village in religious determinations far more profoundly than would administration of a neutral system. See *Fowler* v. *Rhode Island*, 345 U.S. 67 (1953); *Cantwell* v *Connecticut*, 310 U.S. 296 (1940).

Neutral principles would thus serve the Village's interests better than petitioners' proposed solution of allowing (or compelling) the Village to discriminate among park usage requests on the basis of the religious content of their speech. Neutral principles would provide a means for dealing with other, non-

religious, forms of symbolic speech—swastikas, burning crosses, and the like—that the Village finds equally troubling. Neutral principles are also far less likely to run afoul of the Constitution. To treat religious expression by private individuals differentially necessarily raises concerns under the Free Speech, Free Exercise, and Establishment Clauses of the First Amendment, as well as the Equal Protection strictures of the Fifth and Fourteenth Amendments. This Court has rejected every attempt by government, to date, to relegate religious speech by individuals to a disfavored status, despite the fact that in every such case it could be argued that to do so would enhance the Establishment Clause value of separation between church and state. See, *e.g.*, *Widmar* v. *Vincent*, *supra*; *McDaniel* v. *Paty*, *supra*; *Niemotko* v. *Maryland*, *supra*; cf. *Heffron* v. *International Society for Krishna Consciousness, Inc.*, 452 U.S. 640 (1981). Petitioners do not make a strong case for entering those perilous waters.

Since neutral time, place, and manner restrictions would fully vindicate the Village's legitimate interests, there is no need in this case for an expansive interpretation of the Establishment Clause, or for a doctrine permitting the Village to discriminate on the basis of the religious content of proposed displays. The judgment below is fully responsive to the Village's concerns, and leaves primary discretion to control the uses of the park to the Village Board of Trustees, where it belongs.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

REX E. LEE
Solicitor General

RICHARD K. WILLARD
Acting Assistant Attorney General

PAUL M. BATOR
Deputy Solicitor General

MICHAEL W. MCCONNELL
Assistant to the Solicitor General

DECEMBER 1984

☆ U. S. GOVERNMENT PRINTING OFFICE: 1984 461531 10120

RESPONDENT'S

BRIEF

No. 84-877

Supreme Court, U.S.
FILED
DEC 28 1984
JOSEPH F. SPANIOL, JR.
CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1984

THE BOARD OF TRUSTEES OF THE VILLAGE OF SCARSDALE and THE VILLAGE OF SCARSDALE,

Petitioners,

—vs.—

KATHLEEN S. MCCREARY, DAVID DRABKIN, ANN F. CAWLEY, ANGELINA J. MESSENGER, EDWARD R. NAPOLITANO, CHARLES E. BUTLER, JOHN D. HAWKINS, NANCY G. STEGER, RICHARD CACCIATO, CAROL ANN PASCAL, MARY T. THOMPSON and GREGORY DE SOUSA,

—and—

THE SCARSDALE CRECHE COMMITTEE, PATRICIA CURRAN, CYNTHIA BARSUHN, GRACE FELLOWS, DORIS ADLER, MARY TULLY, JOAN MANN and MARIA PEDULLA,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENTS THE SCARSDALE CRECHE COMMITTEE, *et al.*

MARVIN SCHWARTZ
(Counsel of Record)
125 Broad Street
New York, New York 10004
(212) 558-4000

SARA GOODMAN
Attorneys for Respondents
The Scarsdale Creche Committee, et al.

December 29, 1984

BEST AVAILABLE COPY

The Questions Presented

1. Does the Establishment Clause prohibit the temporary display of a privately-sponsored creche in a public park in the context of a municipality's observance of the Christmas holiday season? *Lynch* v. *Donnelly*, 104 S. Ct. 1355 (1984).

2. Is a municipality, having no time, place or manner regulations governing the use of its parks, and having freely granted access to its parks for other unattended symbolic displays, required to grant access for the creche? *Widmar* v. *Vincent*, 454 U.S. 263 (1981).

TABLE OF CONTENTS

	PAGE
The Questions Presented	i
Table of Contents	iii
Table of Authorities	iv
Statement of the Case	1
Summary of Argument	5
ARGUMENT	7
I. The Village of Scarsdale freely permits the display of symbols in its parks. No compelling state interest permits the Village to ban a creche solely on the ground that it may offend.	7
A. The First Amendment protects symbols and signs not attended by their human proponents.	10
B. The Creche Committee's display did not constitute governmental endorsement of any religious or controversial message, and did not compel anyone to affirm or endorse any belief.	18
C. Christmas is a national holiday and the creche a traditional symbol of Christmas.	22
II. The Establishment Clause does not prohibit the temporary display of a privately-sponsored creche in a public park at Christmas.	23
CONCLUSION	31

TABLE OF AUTHORITIES

PAGE

Cases

Abington School District v. *Schempp*, 374 U.S. 203 (1963) 22
ACLU v. *Rabun County Chamber of Commerce, Inc.*, 678 F.2d 1379 (11th Cir. 1982), *modified*, 698 F.2d 1098 (11th Cir. 1983) 22

Bolger v. *Youngs Drug Products Corp.*, 103 S. Ct. 2875 (1983) 10

Cantwell v. *Connecticut*, 310 U.S. 296 (1940) .. 15
Chaplinsky v. *New Hampshire*, 315 U.S. 568 (1942) 23
Clark v. *Community for Creative Non-Violence*, 104 S. Ct. 3065 (1984) 11, 12
Coalition for Abortion Rights and Against Sterilization Abuse v. *Niagara Frontier Transportation Authority*, 584 F. Supp. 985 (W.D.N.Y. 1984).. 11, 15
Coates v. *Cincinnati*, 402 U.S. 611 (1971) 14
Cohen v. *California*, 403 U.S. 15 (1971) 10, 14

Edwards v. *South Carolina*, 372 U.S. 229 (1963) 14
Everson v. *Board of Education*, 330 U.S. 1 (1947) 25

Gooding v. *Wilson*, 405 U.S. 518 (1972) 23

Kingsley International Pictures Corp. v. *Regents*, 360 U.S. 684 (1959) 13
Kunz v. *New York*, 340 U.S. 290 (1951) 9, 15

Lebron v. *Washington Metropolitan Area Transit Authority*, No. 84-5189 (D.C. Cir. December 14, 1984) 11
Lehman v. *City of Shaker Heights*, 418 U.S. 298 (1974) 6, 11, 26
Lynch v. *Donnelly*, 104 S. Ct. 1355 (1984) ..... *passim*

PAGE

Marsh v. *Chambers*, 103 S. Ct. 3330 (1983) ... 22, 24
McDaniel v. *Paty*, 435 U.S. 618 (1978) 9, 29
Members of the City Council v. *Taxpayers for Vincent*, 104 S. Ct. 2118 (1984) 10-12, 17
Metromedia, Inc. v. *City of San Diego*, 453 U.S. 490 (1981) ..... *passim*
Mueller v. *Allen*, 103 S. Ct. 3062 (1983) 25, 28

Niemotko v. *Maryland*, 340 U.S. 268 (1951) ... 17-18

O'Hair v. *Andrus*, 613 F.2d 931 (D.C. Cir. 1979).. 22, 26
Organization for a Better Austin v. *Keefe*, 402 U.S. 415 (1971) 10

Perry Education Ass'n v. *Perry Local Educators' Ass'n*, 460 U.S. 37 (1983) 6
Planned Parenthood Association/Chicago Area v. *Chicago Transit Authority*, 592 F. Supp. 544 (N.D. Ill. 1984) 11, 15
Police Department of Chicago v. *Mosley*, 408 U.S. 92 (1972) 29

Rubin v. *Village of Scarsdale*, 440 F. Supp. 607 (S.D.N.Y. 1977) 3

Schneider v. *State*, 308 U.S. 147 (1939) 15
Shuttlesworth v. *Birmingham*, 394 U.S. 147 (1969) 15
Southeastern Promotions, Ltd. v. *Conrad*, 420 U.S. 546 (1975) 15, 16
Spence v. *Washington*, 418 U.S. 405 (1974) 6, 10
Staub v. *Baxley*, 355 U.S. 313 (1958) 15
Stone v. *Graham*, 449 U.S. 39 (1980) 22
Street v. *New York*, 394 U.S. 576 (1969) 10, 14
Stromberg v. *California*, 283 U.S. 359 (1931) ... 10

Terminiello v. *Chicago*, 337 U.S. 1 (1949) 10, 14
Tinker v. *Des Moines Independent Community School District*, 393 U.S. 503 (1969) 10

PAGE

United States v. *Ballard*, 322 U.S. 78 (1944) 14, 29
United States v. *Grace*, 461 U.S. 171 (1983) 16
U.S. Southwest Africa/Namibia Trade and Cultural Council v. *United States*, 708 F.2d 760 (D.C. Cir. 1983) 11
West Virginia State Board of Education v. *Barnette*, 319 U.S. 624 (1943) 20
Widmar v. *Vincent*, 454 U.S. 263 (1981) ..... *passim*
Women Strike for Peace v. *Morton*, 472 F.2d 1273 (D.C. Cir. 1972) 15
Wooley v. *Maynard*, 430 U.S. 705 (1977) 20-21, 22
Zorach v. *Clauson*, 343 U.S. 306 (1952) 14

Statutes

5 U.S.C. § 6103 22

Other Authorities

Gaffney, *Political Divisiveness Along Religious Lines: The Entanglement of the Court in Sloppy History and Bad Public Policy*, 24 St. Louis U.L.J. 205 (1980) 29
Scott Specialized Catalogue of United States Stamps 1984 (62d ed. 1983) 23
The Great Seal of the United States (U.S. Department of State, July 1980) 24

IN THE
Supreme Court of the United States
October Term, 1984

No. 84-277

THE BOARD OF TRUSTEES OF THE VILLAGE OF SCARSDALE and THE VILLAGE OF SCARSDALE,
Petitioners,

—vs.—

KATHLEEN S. MCCREARY, DAVID DRABKIN, ANN F. CAWLEY, ANGELINA J. MESSENGER, EDWARD R. NAPOLITANO, CHARLES E. BUTLER, JOHN D. HAWKINS, NANCY G. STEGER, RICHARD CACCIATO, CAROL ANN PASCAL, MARY T. THOMPSON and GREGORY DE SOUSA,

—and—

THE SCARSDALE CRECHE COMMITTEE, PATRICIA CURRAN, CYNTHIA BARSUHN, GRACE FELLOWS, DORIS ADLER, MARY TULLY, JOAN MANN and MARIA PEDULLA,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENTS THE SCARSDALE CRECHE COMMITTEE, *et al.*

Statement of the Case

Each of the seven individual members of Respondent The Scarsdale Creche Committee represents a Protestant or Catholic church in the Scarsdale area. During each Christ-

mas season from 1957 to 1980, the Creche Committee displayed its privately-owned nativity scene for approximately two weeks in Boniface Circle, a small park in the center of Scarsdale's retail business district (Pet. 6a, 7a, 28a, 29a; Stip. Ex. 1).* As the District Court found, Boniface Circle is a "traditional public forum" (Pet. 42a, 45a, 11a) and for many years, one of its primary uses has been as a "locus for Christmas celebration" (Pet. 29a, 44a, 5a, 6a).

Each year, the Creche Committee has sought and obtained the permission of the Village's governing body, the Board of Trustees, to display the creche (Pet. 29a-30a; J.A. 33-34). No Village ordinance or regulation prohibits the display of symbols, signs or billboards on Village-owned property, and there is no Village ordinance or regulation which provides standards of any sort for dealing with applications for the use of Scarsdale's parks (Pet. 3a-4a, 28a; J.A. 45). All is left to the discretion of the Village's seven trustees (*Id.; see, e.g.*, J.A. 50-65).

In 1976, the Village's grant of permission for display of the creche was conditioned upon the posting by the Creche Committee of a sign which read, "This creche has been erected and maintained solely by the Scarsdale Creche Committee, a private organization" (Pet. 8a; J.A. 36-37, 122-23). The Committee posted such a sign beside the creche each year thereafter (*Id.*). While the sign's language was imposed by the Village Trustees, the Village did not specify the size of the sign (J.A. 37) and never once complained in the five years that it was posted that the sign was too small or too inconspicuous.

---

* "J.A." refers to the Joint Appendix, "Pet." to the Appendix to the Petition for a Writ of Certiorari, "Stip. Ex." to exhibits included in the District Court record, and "Pet. Br." to petitioners' brief.

In the 24 years that the Creche Committee was allowed to display its creche at Boniface Circle, the Committee neither solicited nor received any public funds or assistance in connection with the storage, erection, display or removal of the creche (Pet. 7a, 29a; J.A. 36), except for the trivial expense in some early years of connecting a 40-watt light bulb to a nearby Village light standard (*Id.*).

Until 1981, the Village's position was that the Creche Committee's display of its creche in Boniface Circle "was a part of a traditional celebration of the Christmas season" (J.A. 188), and that by granting permission to a private group for the display, the Village was neither advancing nor promoting religion but was simply treating the Creche Committee like any other local applicant for the use of parkland (J.A. 174, 178, 186, 188).*

However, in 1981 four of the seven Village Trustees yielded to opposition by some residents who complained that the Creche Committee's display was not "neighborly" (J.A. 144, 136), was "offensive" (*Id.*) and was "not congruent with the separation of church and state" (J.A. 145). Reversing a tradition of 24 years' standing, the trustees refused to permit display of the creche in 1981 and 1982 and refused to act upon the Creche Committee's application for Christmas of 1983. Thereupon the Creche Committee brought suit in the District Court.

The District Court found after a trial on stipulated facts and deposition testimony that

---

* The Village stated this position in 1977 in opposing a lawsuit which sought to enjoin the Creche Committee's display of the creche. *See generally* J.A. 174-89. The suit was brought by a lawyer associated with the New York Civil Liberties Union (J.A. 199) and was dismissed on procedural grounds. *Rubin* v. *Village of Scarsdale*, 440 F. Supp. 607 (S.D.N.Y. 1977).

(1) Boniface Circle is a "traditional public forum" (Pet. 42a, 45a, 46a, 11a).

(2) The Village's denial of access was "content-based" (Pet. 46a-47a, 12a).

(3) The reason for denying access was the "feeling that because the symbol was religious it should not be on *any* public land" (Pet. 46a, 12a) (emphasis in original).

(4) Except for respondents, *all* applicants for the use of Boniface Circle were either granted access or were referred to other parts of the Scarsdale park system (Pet. 46a-47a, 4a, 12a).

The District Court found further that in the 26 years reflected in the record, the Village has "freely granted access" to its parks "for the erection of symbols and other three dimensional objects" (Pet. 46a-47a).* Symbolic displays in Scarsdale's parks, unattended by sponsors and often remaining in place for weeks, have included the Red Cross (J.A. 58-59), the Red Cross' banners (J.A. 59), the sword of the Crusade for Cancer (J.A. 61), the rocketship of the Scarsdale Community Fund (J.A. 62), the signs of the United Fund (J.A. 62-63), the signs and banners of the American Field Service (J.A. 59-60), and the Christmas lights and ornaments of the Chamber of Commerce, the Arthur Manor Association and the Village of Scarsdale itself (J.A. 50, 51, 53, 54). Similarly, unattended displays of all sorts—religious and secular—are commonplace in the Village-owned public library (Pet. 4a; J.A. 57-58). The only display ever excluded from Scarsdale's

* Petitioners challenged none of these findings in the Court of Appeals and do not question them in this Court.

parks was the creche and the sole reason for its exclusion was the religious content of the scene it depicted.

While the Village Trustees excluded the creche from Scarsdale's Christmas observance because of its religious significance, the celebration of the holiday at Boniface Circle has not been entirely secular. In 1982, for example, and as has been the tradition in Scarsdale for many years, the Chamber of Commerce hung Christmas lights and ornaments from Village-owned lamp posts located inside Boniface Circle and throughout the area surrounding the park (J.A. 50-51; Pet. 5a). Village employees strung Village-owned Christmas lights on the large evergreen tree growing in Boniface Circle (J.A. 53; Pet. 6a). Christmas music was broadcast throughout the Boniface Circle area for the entire 1982 holiday season (J.A. 50-51). And the annual "Carol Sing," sponsored by a local civic organization, opened with an official welcome from the Deputy Mayor and the traditional arrival of Santa Claus on one of the Village's own fire trucks (J.A. 52).* In this Christmas setting, the carolers proclaimed the birth and divinity of Jesus Christ with such traditional Christmas hymns as *Hark the Herald Angels Sing, O Little Town of Bethlehem, Silent Night* and *The First Noel* (J.A. 52-53; *see generally* J.A. 230-43).

Summary of Argument

In *Widmar* v. *Vincent*, 454 U.S. 263 (1981), this Court struck down as violative of university students' First Amend-

* Thus, contrary to petitioners' assertion, the creche never stood entirely alone in Boniface Circle in "sharp, isolated relief" (Pet. Br. 15). As the parties stipulated, the creche stood "for many years" amidst Christmas lights and ornaments strung from Village-owned lamp posts inside the park and throughout the entire surrounding business district and, in 1982, the nearby evergreen tree was decorated with Christmas lights for two and one-half weeks (J.A. 50, 51, 53).

ment right to freely speak their minds a university regulation that forbade the use of university facilities for religious meetings. The key to the decision in *Widmar* was that university facilities were freely available to student groups of all sorts for the expression of all sorts of views. And so here: Scarsdale's parks are freely available to all who seek to use them (Pet. 4a-6a, 19a, 44a, 46a-47a; *see especially* J.A. 50-65).

The difference which petitioners stress between *Widmar* and this case is that here we deal with a religious symbol, albeit a symbol which is traditional in the observance of a national holiday. That difference cannot justify Scarsdale's content-based exclusion, for the display of signs and symbols is not beyond the pale of First Amendment protection. *Metromedia, Inc.* v. *City of San Diego,* 453 U.S. 490 (1981); *Spence* v. *Washington,* 418 U.S. 405 (1974); *Lehman* v. *City of Shaker Heights,* 418 U.S. 298, 308-22 (1974) (dissenting opinion).

This Court's mandate in *Widmar* compelled the issuance of an injunction. While the governing body of a state university has the broadest discretion to govern the affairs of the school, that discretion does not include the power to deny access to campus facilities solely because a proposed use involves religious advocacy, even worship. Similarly, Scarsdale's trustees have no discretion to suppress religious expression in Village parks which are freely available to all who seek to use them. The village park, of course, is the "quintessential" public forum. *Perry Education Ass'n* v. *Perry Local Educators' Ass'n,* 460 U.S. 37, 45 (1983).

Lynch v. *Donnelly,* 104 S. Ct. 1355 (1984) held that the Establishment Clause is not violated by a city's display of a city-owned creche in the context of the city's Christmas observance. If the city in *Lynch* did not impermissibly advance religion by display of its creche, it necessarily follows that the Establishment Clause would not be offended by the Creche Committee's display of its privately-owned creche in a traditional public forum in the context of a similar Christmas observance.

Thus, under *Widmar* and *Lynch,* and in the absence of any pre-existing and uniformly applied, content-neutral restrictions reasonably related to a substantial governmental interest, Scarsdale's trustees have no right to suppress petitioners' symbolic religious expression in Village parks which are freely available to all others for unattended symbolic expression.

To argue, as petitioners do (Pet. Br. 15), that the "weighty" interests reflected in the Religion Clauses justify suppression of symbolic religious speech is to find in the Religion Clauses a constitutional aversion to religion which would qualify freedom of speech where religion is concerned. The First Amendment cannot be so read. The Religion Clauses give government no more power to abridge the freedom of speech of religious advocates than of advocates for any other cause.

ARGUMENT

I.

The Village of Scarsdale freely permits the display of symbols in its parks. No compelling state interest permits the Village to ban a creche solely on the ground that it may offend.

Petitioners' brief, with its persistent emphasis upon "unwanted" and "offensive" symbols, community discord and

the alleged intent of the Creche Committee to cram its religious message down the throats of its neighbors, tends to obscure the two relatively narrow issues presented here. It is accordingly appropriate to reiterate those issues:

> 1. Does the Establishment Clause prohibit the temporary display of a privately-sponsored creche in a public park in the context of the Village's traditional observance of the Christmas holiday? *Lynch* v. *Donnelly*, 104 S. Ct. 1355 (1984).
>
> 2. Has the Village demonstrated any compelling state interest which could justify its content-based denial of access? *Widmar* v. *Vincent*, 454 U.S. 263 (1981).

Bearing in mind those issues, it is a critical fact that, as the District Court found, the Village of Scarsdale has "freely" granted access to its parks "for the erection of symbols and other three dimensional objects" (Pet. 46a-47a). Petitioners did not challenge that finding in the Court of Appeals and do not question it in this Court.

The only symbol ever banned from Scarsdale's parks was the creche and the sole ground for the ban was the feeling on the part of the Village Trustees that "because the symbol was religious it should not be on *any* public land" (Pet. 12a, 46a). The District Court so found (Pet. 46a) and that finding was explicitly sustained by the Court of Appeals (Pet. 12a).

The issue is not, as petitioners assert, whether the Creche Committee has the constitutional right to insist upon Boniface Circle as the site for its creche. The Creche Committee was and remains willing to use Depot Plaza (J.A. 262-64; Pet. 47a n.12), where the creche would be accessible to commuters and other pedestrians, and was willing to display

its nativity scene on a small piece of centrally-located parkland which the Village had proposed deeding to a private foundation for community use (Pet. 47a n.12; J.A. 41, 211, 262-63).* As the District Court found, "The Creche Committee . . . approved 'of displaying the creche at Chase Park because it is centrally located and accessible to pedestrians' . . . and [t]he Village also had reason to know that 'Depot Plaza' would have been an acceptable alternative site" (Pet. 47a n.12). Accordingly, the issue is whether Scarsdale's trustees unlawfully banned the creche from *any* public land *anywhere* in Scarsdale.

All three *amici* argue that the Village's ban was justifiable because the creche has religious significance. Petitioners, however, apparently recognizing that religious speech cannot be singled out for suppression, *McDaniel* v. *Paty*, 435 U.S. 618, 636-42 (1978) (concurring opinion); *Kunz* v. *New York*, 340 U.S. 290 (1951); (*but see* Pet. Br. 15), go much further and argue that *any* symbolic expression may be banned from a traditional public forum if it is "offensive" (Pet. Br. 14), "objectionable" (Pet. Br. 19, 20, 25, 30), "ugly" (Pet. Br. 16, 25), "emotionally significant" (Pet. Br. 19), "partisan" (Pet. Br. 30), "sectarian" (Pet. Br. 30, 35), "disagreeable" (Pet. Br. 14), "repugnant" (Pet. Br. 14, 16, 30, 35), "painful" (Pet. Br. 14, 20), "charged" (Pet. Br. 19), "highly charged" (Pet. Br. 21), "unsuitable" (Pet. Br. 16), "divisive" (Pet. Br. 25), "unwanted" (Pet. Br. 27) or "otherwise unacceptable" (Pet. Br. 25).

That argument necessarily assumes that symbolic expression is not protected by the First Amendment. Otherwise

---

* The "Heritage Plaza" project was aborted by the opposition of the American Civil Liberties Union, an *amicus curiae* here, which threatened litigation and a "very large and ugly" floor fight in the New York State Legislature (J.A. 41, 216).

the argument would stand the First Amendment on its head, for it is an unquestioned principle that the speech most worthy of constitutional protection is the speech that "stirs people to anger," *Terminiello* v. *Chicago,* 337 U.S. 1, 4 (1949), and that "offensiveness" is " 'classically not [a] justificatio[n] validating the suppression of expression protected by the First Amendment.' " *Bolger* v. *Youngs Drug Products Corp.,* 103 S. Ct. 2875, 2883 (1983), *quoting Carey* v. *Population Services International,* 431 U.S. 678, 701 (1977); *Organization for a Better Austin* v. *Keefe,* 402 U.S. 415, 419 (1971); *Cohen* v. *California,* 403 U.S. 15 (1971); *Street* v. *New York,* 394 U.S. 576, 592 (1969).

In any event, petitioners' implicit assumption is false: symbolic displays are *not* beyond the First Amendment's pale.

A. The First Amendment protects symbols and signs not attended by their human proponents.

There can be no doubt that communication by signs and symbols enjoys the protection of the First Amendment. *Metromedia, Inc.* v. *City of San Diego,* 453 U.S. 490 (1981) (billboards); *Spence* v. *Washington,* 418 U.S. 405 (1974) (flag hung outside apartment window); *Tinker* v. *Des Moines Independent Community School District,* 393 U.S. 503 (1969) (black armband); *Stromberg* v. *California,* 283 U.S. 359 (1931) (red flag).

Symbolic expression is not stripped of protection simply because it is unattended by human proponents. In *Metromedia,* for example, the fact that billboards are "large, immobile and permanent structure[s]," 453 U.S. at 502, and unattended, did not prevent the Court from striking down a local ordinance that distinguished between permissible and impermissible signs on the basis of content. Likewise, in *Members of the City Council* v. *Taxpayers for*

Vincent, 104 S. Ct. 2118 (1984), the Court would not have gone to the trouble of determining whether an ordinance prohibiting the posting of signs on utility poles was content-neutral and supported by a substantial governmental interest, if such signs were unprotected communication.

And so if buses and rapid transit cars are public forums, a municipality may not ban political placards at the same time that it permits commercial advertisements. *Lehman* v. *City of Shaker Heights,* 418 U.S. 298, 308-22 (1974) (dissenting opinion). As Justice Brennan said for the dissenters in that case,

> In my view, the city created a forum for the dissemination of information and expression of ideas when it accepted and displayed commercial and public service advertisements on its rapid transit vehicles. Having opened a forum for communication, the city is barred by the First and Fourteenth Amendments from discriminating among forum users solely on the basis of message content. 418 U.S. at 310.*

Petitioners cite *Clark* v. *Community for Creative Non-Violence,* 104 S. Ct. 3065 (1984) and *Members of the City Council* v. *Taxpayers for Vincent,* 104 S. Ct. 2118 (1984) for the proposition that the right to communicate in a traditional public forum does not include the right to temporarily display unattended symbols (Pet. Br. 28). Those cases hold no such thing. In *Taxpayers for Vincent,*

---

* *Accord, Lebron* v. *Washington Metropolitan Area Transit Authority,* No. 84-5189 (D.C. Cir. December 14, 1984); *U.S. Southwest Africa/Namibia Trade and Cultural Council* v. *United States,* 708 F.2d 760, 764-68 (D.C. Cir. 1983); *Planned Parenthood Association/Chicago Area* v. *Chicago Transit Authority,* 592 F. Supp. 544 (N.D. Ill. 1984); *Coalition for Abortion Rights and Against Sterilization Abuse* v. *Niagara Frontier Transportation Authority,* 584 F. Supp. 985 (W.D.N.Y. 1984).

the Court explicitly found that the existence of a public forum had not been established. 104 S. Ct. at 2134. And the issue in *Clark* was not whether the homeless had a First Amendment right to erect symbolic tents, out rather whether overnight *sleeping* in Lafayette Park and the Mall could be regulated by content-neutral time, place and manner restrictions. All that the Court held in *Clark* is that the National Park Service's restrictions on sleeping were "clearly limitations on the *manner* in which the demonstration could be carried out." 104 S. Ct. at 3069 (emphasis added). In neither *Clark* nor *Taxpayers for Vincent* did the Court uphold restrictions on symbolic expression on the ground that there was no right of access to a public forum or that the expression at issue was unprotected.

Regardless of whether there is a right generally to display unattended symbols temporarily in a traditional public forum, if a municipality freely permits such displays, as Scarsdale does, it may not discriminate on the basis of message content. "The Constitution forbids a State to enforce certain exclusions from a forum generally open to the public even if it was not required to create the forum in the first place." *Widmar,* 454 U.S. at 267-68.

Petitioners attempt to justify their discrimination on the ground that the symbols they permit are not "sectarian" or "partisan," but are "signs of basic American verities" which are "wrapped in the shared and approving sentiments of the community" (Pet. Br. 31, 19). That is nonsense—and constitutionally pernicious as well.

The nonsense lies in the surprising assertion that all of the statuary in our nation's parks proclaim values that are shared by all of our people. Petitioners apparently forget that memorial statues of the Confederate Soldier adorn almost every county seat of the old Confederacy and that

one of the prides of Richmond is that city's statues of Jefferson Davis, Robert E. Lee, Jeb Stewart and Stonewall Jackson which line Monument Avenue. It is as cynical as it is nonsensical to postulate that symbols such as these are expressions "shared" by the black citizens of the South or by the millions of citizens of the South whose education and upbringing reflect the traditions and values of other parts of the country.

It would more accurate to say of the statuary and symbolic displays which decorate our parks that they are tolerated by our people without notable discord. It is the accuracy of that observation which highlights a basic flaw in petitioners' position: its predicate is regrettable intolerance.

The pernicious aspect of petitioners' argument is the notion that the only permissible displays in our public parks are those that reflect "shared" values and "basic American verities." A notion so unthinkable could not prevail so long as this Court sits.

Few have ever understood the First Amendment to protect only "basic American verities" and "shared sentiments." If petitioners' assertion is valid, then this Court erred when it stated that the First Amendment's "guarantee is not confined to the expression of ideas that are conventional or shared by a majority," *Kingsley International Pictures Corp.* v. *Regents,* 360 U.S. 684, 689 (1959), or when it declared:

> a function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound

> unsettling effects as it presses for acceptance of an idea. That is why freedom of speech, though not absolute, . . . is nevertheless protected against censorship or punishment, *unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest.* . . . There is no room under our Constitution for a more restrictive view. For the alternative would lead to standardization of ideas either by legislatures, courts, or dominant political or community groups. *Terminiello* v. *Chicago,* 337 U.S. 1, 4-5 (1949) (emphasis added) (citations omitted).

The First Amendment does not permit government to protect against "offense" at the cost of suppressing First Amendment expression. *Cohen* v. *California,* 403 U.S. 15 (1971); *Coates* v. *Cincinnati,* 402 U.S. 611 (1971); *Street* v. *New York,* 394 U.S. 576 (1969); *Edwards* v. *South Carolina,* 372 U.S. 229 (1963). One traditional value expressed in the Constitution is tolerance and respect for our neighbor's beliefs. *Zorach* v. *Clauson,* 343 U.S. 306, 313-14 (1952); *United States* v. *Ballard,* 322 U.S. 78 (1944). As the Court said in *Ballard,* 322 U.S. at 87,

> The Fathers of the Constitution were not unaware of the varied and extreme views of religious sects, of the violence of disagreement among them, and of the lack of any one religious creed on which all men would agree. They fashioned a charter of government which envisaged the widest possible toleration of conflicting views.

Petitioners pervert that value by arguing that intolerance justifies the suppression of a traditional Christmas display.

The substance of petitioners' argumentation is that they have the unreviewable discretion to permit a billboard on

public property that entreats gifts to the Red Cross or the Community Fund, but at the same time to ban a billboard fundraising plea by Planned Parenthood if that organization's birth control and abortion clinics are offensive to some who live in Scarsdale. Invidious distinctions of that sort are anathema to the First Amendment.*

The First Amendment does not tolerate conditioning the right to speak upon governmental determinations of what is or what is not religious or offensive, or what is or what is not in the "community interest." *Southeastern Promotions, Ltd.* v. *Conrad,* 420 U.S. 546 (1975); *Shuttlesworth* v. *Birmingham,* 394 U.S. 147, 150-53 (1969); *Staub* v. *Baxley,* 355 U.S. 313, 322-25 (1958); *Kunz* v. *New York,* 340 U.S. 290, 293-94 (1951); *Cantwell* v. *Connecticut,* 310 U.S. 296, 305-07 (1940). That principle is as applicable to the display of unattended symbols as it is to other forms of expression. *Metromedia, Inc.* v. *City of San Diego,* 453 U.S. 490 (1981); *Women Strike for Peace* v. *Morton,* 472 F.2d 1273 (D.C. Cir. 1972).

Nor is it any answer to say, as petitioners do, that the Creche Committee could display its nativity scene on private property. This Court rejected that argument some years ago in *Schneider* v. *State,* 308 U.S. 147, 163 (1939), where it stated that "one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place." *Accord,*

---

* *Planned Parenthood Association/Chicago Area* v. *Chicago Transit Authority,* 592 F. Supp. 544 (N.D. Ill. 1984) (Public transit authority violated Planned Parenthood's First Amendment rights when it created a public forum for unattended display advertising but refused to accommodate "controversial" messages about birth control); *Coalition for Abortion Rights and Against Sterilization Abuse* v. *Niagara Frontier Transportation Authority,* 584 F. Supp. 985 (W.D. N.Y. 1984) (same).

Southeastern Promotions, Ltd. v. *Conrad,* 420 U.S. 546, 556 (1975).

Petitioners accuse respondents and the Court of Appeals of treating suppression of the creche on the "crude premise" that all forms of expression are undifferentiated speech governed across the board by rigid and uniform constitutional rules (Pet. Br. 16). That attack is empty hyperbole, particularly since Scarsdale has freely permitted the display of unattended signs and symbols in its parks (Pet. 46a-47a; J.A. 50, 51, 53, 54, 58, 59, 61, 62).

There is no doubt that the constitutional rules governing different methods of communication "must reflect the 'differing natures, values, abuses and dangers' of each *method,*" *Metromedia,* 453 U.S. at 501 (emphasis added), *quoting Kovacs* v. *Cooper,* 336 U.S. 77, 97 (1949), but *content-based* discrimination in any medium of communication is forbidden unless supported by some compelling public interest. We could blind ourselves to all but the law of billboards and bus placards, or the law of the kinds of symbols Scarsdale permits in its parks, and the result would be the same: the First Amendment does not permit Scarsdale to exclude public expression in its parks on the basis of content, to license the Red Cross, yet reject the creche.

We do not suggest that if oral speech is allowed in a particular forum, then *ipso facto* symbolic displays must be permitted there as well. Reasonable "time, place and manner" restrictions are permissible so long as they are justified without reference to the content of the regulated speech, are narrowly tailored to serve a significant governmental interest, and leave open ample alternative channels for communication. *United States* v. *Grace,* 461 U.S. 171, 177 (1983); *Metromedia,* 453 U.S. at 516. The government has legitimate interests in controlling the noncommu-

nicative aspects of any medium, "but the First and Fourteenth Amendments foreclose a similar interest in controlling the *communicative* aspects." *Id.* at 502. The noncommunicative aspects of signs and symbols may be regulated, but only if the regulation

> furthers an important or substantial governmental interest; *if the governmental interest is unrelated to the suppression of free expression;* and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest. *Members of the City Council* v. *Taxpayers for Vincent,* 104 S. Ct. at 2129, *quoting United States* v. *O'Brien,* 391 U.S. 367, 377 (1968) (emphasis added).

Here, of course, there are no "time, place and manner" restrictions of any sort—reasonable or unreasonable. As the parties stipulated, and as the District Court stressed, the Village has "no statutes or regulations setting forth guidelines upon which the board bases its decision to grant or deny access, and . . . there are no statutes or ordinances which otherwise set forth guidelines as to how and when Village property may be used" (Pet. 28a; J.A. 45). In Scarsdale, all is left to the discretion—"subjective kinds of evaluations" (J.A. 306)—of the Village's seven trustees.* Scarsdale excluded the creche while freely permitting temporary displays by others. Suppression was entirely content-based and except for the Establishment Clause, the only

---

* "In the instant case we are met with no ordinance or statute regulating or prohibiting the use of the park; all that is here is an amorphous 'practice,' whereby all authority to grant permits for the use of the park is in the Park Commissioner and the City Council. No standards appear anywhere; no narrowly drawn limitations; no circumscribing of this absolute power; no substantial interest of the community to be served. . . . The conclusion is inescapable that the use of the park was denied because of the City Council's dislike for

governmental interest suggested by petitioners is the constitutionally impermissible desire to suppress expression that would be unwanted, controversial or offensive to some segment of the population.*

In these circumstances, Scarsdale's denial of permission to display the creche offends the Free Speech Clause of the First Amendment. Moreover, since Scarsdale has no regulation whatsoever governing the time, place or manner of the display of symbols in its parks, the record here does not permit exploration of the circumstances under which displays may be restricted.

B. The Creche Committee's display did not constitute governmental endorsement of any religious or controversial message, and did not compel anyone to affirm or endorse any belief.

It is a persistent theme of petitioners' brief (Pet. Br. 13, 17-18, 32, 42) that the Creche Committee insisted upon public land for display of the creche for the purpose of conveying the false impression that the Village endorsed the creche's religious message. That argument is both constitutionally irrelevant and factually incorrect. What matters here is that since Scarsdale has no "time, place or manner" regulations and has freely permitted unattended symbolic displays in its parks, the Creche Committee—like any other

---

or disagreement with the [appellants] or their views. The right to equal protection of the laws, in the exercise of those freedoms of speech and religion protected by the First and Fourteenth Amendments, has a firmer foundation than the whims or personal opinions of a local governing body." *Niemotko* v. *Maryland*, 340 U.S. 268, 271-72 (1951).

* Petitioners assert that Jews comprise the largest ethnic group in Scarsdale and constitute roughly 50% of the total number of families. The assertion is not supported by the record and is, in any event, irrelevant. It would make no constitutional difference that those who oppose the display of the creche are either an overwhelming majority or a small minority.

group in the Village—has the constitutional right to display its creche.

(1) The alleged intention of the Creche Committee is constitutionally irrelevant. This Court has never permitted the suppression of protected speech—be it innocuous or offensive—because of the alleged improper motive of the speaker. It would be disturbing indeed if municipal functionaries were permitted even to inquire into the purpose or motive of those who seek to express their views in a traditional public forum.

We note that in recent years the Vatican has made available Michelangelo's *Pieta* and other precious works of religious art for exhibition in state-owned or state-supported museums throughout the United States. As petitioners would have the Court read the Constitution, the Vatican's generosity would be constitutionally impermissible if it could be established that the real purpose of the exhibition was to proselytize and to convey the false impression that the proselytization was supported and endorsed by the prestige and authority of Washington's National Gallery and New York's Metropolitan Museum.

(2) In any event, the Creche Committee did not intend to convey the appearance of governmental support or to force others to endorse the religious message of the creche. The Committee sought only to express and celebrate its beliefs, and those of its member churches, in a public park.

The Creche Committee originally chose Boniface Circle for its display because it was then the site of Scarsdale's annual Christmas "Carol Sing" (J.A. 261, 269). In 1980, the Committee agreed to display the creche on private property near Boniface Circle (Pet. 9a; J.A. 41, 134, 261-64), but the agreed-upon sites were not made available (*Id.*). When the Village refused to permit display of the

creche in Boniface Circle in 1981, the Committee displayed it across the street on private property, where it was vandalized (J.A. 41, 264, 266). On the understanding that the property abutting the local railroad station was privately owned, the Committee was willing to display the creche there (J.A. 262-64). Similarly, the Committee favored the idea of displaying the creche on centrally-located land which would be deeded by the Village to a private foundation for community use (Pet. 47a n.12; J.A. 41, 262-63). That project was abandoned in the face of opposition by the American Civil Liberties Union (J.A. 216, 41).

Contrary to petitioners' strained interpretation, the message desired by the Creche Committee quite obviously was not that all citizens of Scarsdale shared its members' religious beliefs, *see, e.g.*, J.A. 223-24, but rather that the Committee's sponsoring churches were of different denominations, so that the creche's display was an "ecumenical" Christmas project sponsored by several rather than by just one particular church (J.A. 275-76, 279).*

(3) Regardless of the Creche Committee's intent, the Village's neutral accommodation of a privately-owned creche cannot be deemed "compelled speech" under *West Virginia State Board of Education* v. *Barnette*, 319 U.S. 624 (1943), and *Wooley* v. *Maynard*, 430 U.S. 705 (1977). In those cases, the Court overturned state statutes that required individuals actually or apparently to affirm as true a particular ideological message. In *Wooley*, for ex-

* The District Court found that the Creche Committee, by describing itself and its member churches' spirit as "ecumenical," *see* J.A. 275-76, 279, 228, intended to convey an appearance of public support for the creche's religious message (Pet. 57a). The Creche Committee challenged that finding on appeal, but the Court of Appeals did not address the question. However, the District Court's finding does not preclude this Court's consideration of stipulated facts and uncontradicted deposition testimony.

ample, the Court found that by punishing persons for covering the state's slogan on automobile license plates, New Hampshire had in effect required its citizens "to use their private property as a 'mobile billboard' for the State's ideological message." 430 U.S. at 715.

In contrast, by permitting the temporary display of a privately-owned nativity scene in an open public forum, accompanied by a sign identifying the sponsor, the Village does not force anyone actually or apparently to affirm the truth of the display's message. No one is compelled to venerate the creche or even to walk by or look at it.* Unlike the situation in *Wooley*, where the message "Live Free or Die" was to be carried by every citizen's automobile, there is no reason here to associate the creche with anyone other than the members of the Creche Committee.

In addition, because Scarsdale's parks are freely available to and used by others to express their individual views, *see, e.g.*, J.A. 50-65, the Creche Committee's message cannot *reasonably* be ascribed to the entire Village. The presence of a disclaimer sign stamps as wholly unreasonable any supposition of governmental support. The fact that the display is unattended does not make more plausible any inference of government support, particularly when the Village freely permits other unattended symbols on public property (Pet. 46a-47a). If the unattended creche in *Lynch*, which was displayed by government and paid for with tax

* *Amicus* The American Civil Liberties Union, without any citations to the record, asserts that the creche was lit and intended to be viewed by automobile passengers at night (Br. 22 n.5). As review of the Joint Appendix and the District Court opinion would have demonstrated, the creche was "unlit altogether" except for a period prior to 1977 when it contained a 40-watt bulb (Pet. 29a), it was intended to be viewed by pedestrians (J.A. 271-72) and, as the District Court found, was "no doubt" intended to be viewed "head-on and from a few feet away" (Pet. 34a).

dollars, did not raise a compelled speech problem, and if, as Justice Rehnquist suggested in *Wooley,* New Hampshire could erect billboards containing ideological messages without being deemed to have compelled its citizens to endorse any message, 430 U.S. at 721, then there is no compelled speech where a municipality merely grants a private group access to a public forum that is available to all.

C. Christmas is a national holiday and the creche a traditional symbol of Christmas.

Petitioners descend to forensic hyperbole by arguing that if they are required to permit the creche, they must likewise permit the burning cross, the swastika and other vile and odious symbols which would sear the sensibilities and torture the soul of Scarsdale (Pet. Br. 13, 14, 16, 24).

It should hardly be necessary to remind petitioners that our sole concern here is the temporary display of a creche in a public park in the context of the Christmas season. We are not concerned here with any other holiday, with any other symbol or with any permanent display of any sort. *Cf. Stone* v. *Graham,* 449 U.S. 39 (1980) (per curiam); *ACLU* v. *Rabun County Chamber of Commerce, Inc.,* 678 F.2d 1379 (11th Cir. 1982), *modified,* 698 F.2d 1098 (11th Cir. 1983).*

Christmas is, after all, a national holiday, 5 U.S.C. § 6103, and the creche is so traditional a symbol of that

* Nor are we concerned here with government's "prescription of prayer and Bible reading in the public schools, during and as part of the curricular day, involving young and impressionable children whose school attendance is statutorily compelled, and utilizing the prestige, power and influence of school administration, staff and authority." *Abington School District* v. *Schempp,* 374 U.S. 203, 307 (1963) (concurring opinion). *See Marsh* v. *Chambers,* 103 S. Ct. 3330, 3335-36 (1983); *O'Hair* v. *Andrus,* 613 F.2d 931, 936 (D.C. Cir. 1979).

holiday that it is featured on our country's postage stamps. *Scott Specialized Catalogue of United States Stamps 1984* (62d ed. 1983) 207, 236.

The only symbol ever banned from Scarsdale's parks was the creche. No one has ever sought to burn a cross on Boniface Circle, to erect a swastika there on Hitler's birthday or to proclaim by billboard there that God does not hear the prayers of Jews or of Republicans or of Democrats (Pet. Br. 14, 16, 31, 34). In the unlikely event that Scarsdale's trustees are one day confronted with such a request, it will be time enough to consider then whether they are indeed powerless to protect the villagers against "fighting" words which "by their very utterance inflict injury or tend to incite an immediate breach of the peace." *Chaplinsky* v. *New Hampshire,* 315 U.S. 568, 572 (1942); *Gooding* v. *Wilson,* 405 U.S. 518, 523 (1972). That, of course, is not the issue here and no hyperbolic construct can make a "fighting" symbol out of a nativity scene.

II.

The Establishment Clause does not prohibit the temporary display of a privately-sponsored creche in a public park at Christmas.

Analysis of petitioners' objection to the creche suggests that it is bottomed upon a notional view of the Establishment Clause which is repugnant to our nation's history and traditions and totally inconsistent with the decisions of this Court. As petitioners seem to read the Establishment Clause, it requires the pretense that Christmas has no religious content.

It is indeed surprising that such a notion should be advanced after last Term's decision in *Lynch* v. *Donnelly,*

104 S. Ct. 1355 (1984). *Lynch*, of course, likewise dealt with a nativity scene—a symbol so prototypical of Christmas that it appears on United States postage stamps.

This Court in *Lynch* considered a city's display of a creche not only in the context of the Christmas season, but also in the context of our nation's traditions and pluralistic religious heritage. 104 S. Ct. at 1358-61. Our coinage proclaims "In God We Trust," and our one-dollar bills depict the reverse of the Great Seal of the United States. The reverse of the Great Seal confirms our national acknowledgment of a Supreme Being: the Eye of Providence and the motto *Annuit Coeptis*, "He [God] has favored our undertakings." That motto alludes to "the many interventions of Providence in favor of the American cause." * It is difficult to understand how the same Constitution which permits national recognition of a Supreme Being, the depiction of a nativity scene on postage stamps and the engagement of chaplains at public expense by the Senate of the United States, the House of Representatives and state legislatures, *Marsh* v. *Chambers*, 103 S. Ct. 3330 (1983), could prohibit recognition of the fact that the Christmas holiday has religious aspects.

Prior to *Lynch*, in *Widmar* v. *Vincent*, 454 U.S. 263 (1981), this Court struck down a regulation prohibiting student religious groups at the University of Missouri from using facilities that were generally open to all student groups. *Widmar* rests on the constitutional principle that the Establishment Clause does not bar the extension of generally available benefits to religious groups. If that were not so, " 'a church could not be protected by the police and fire departments, or have its public sidewalk kept in repair.' " 454 U.S. at 274-75, *quoting Roemer* v. *Maryland Public Works Board*, 426 U.S. 736, 747 (1976). *See also Mueller* v. *Allen*, 103 S. Ct. 3062 (1983); *Everson* v. *Board of Education*, 330 U.S. 1, 16-18 (1947).

* *The Great Seal of the United States* (U.S. Department of State, July 1980) 6, 9.

As the Court of Appeals recognized, the logic of *Widmar* and its predecessors governs here. The Village of Scarsdale, freely granting access to its parks for the temporary display of unattended symbols, would not transgress the Establishment Clause by granting the same access to the Creche Committee on a nondiscriminatory basis. Indeed, before this Court decided *Widmar* or *Lynch*, the Village itself recognized and argued in *Rubin* that its neutral accommodation of the Creche Committee would not offend the Establishment Clause. J.A. 174-89. The Village was entirely correct: the Establishment Clause provides no compelling state interest in excluding the creche from Scarsdale's parks.

Petitioners strenuously object that the Court of Appeals engaged in a "remarkable stretching" of *Widmar* because the exclusion there applied to live speakers, whereas the creche is an unattended symbol (Pet. Br. 13). They argue first that the Free Speech Clause does not protect communication through such symbols. As discussed earlier, that argument has no merit.

The Village also asserts that while permitting use of a public forum for religious speech does not violate the Establishment Clause, accommodating a temporary creche display does, because it results in the placement of an "imprimatur of State approval on religious sects or practices" (Pet. Br. 26). That argument is disposed of by this Court's decision in *Lynch* that a city could itself constitutionally maintain and display a creche at Christmas. As the Court of Appeals correctly reasoned,

> If the *Lynch* creche was not construed as a primary advancement of religion, *a fortiori*, the Village's

> neutral accommodation herein to permit the [private] display of a creche in a traditional public forum at virtually no expense to it cannot be viewed as a violation of the primary-effect prong of the *Lemon* test and, therefore, violative of the establishment clause (Pet. 19a).

Petitioners struggle to distinguish *Lynch*, but their supposed distinctions are insubstantial.

The public land/private land distinction has no merit. If the Establishment Clause is not offended when a municipality *actually* sponsors a creche, it cannot be offended merely because a municipality *might appear* to sponsor one. In any event, there was no such appearance here, where a disclaimer sign identified the private sponsor, the Village's non-endorsement of the creche received wide publicity (*see* Pet. 22a), and the Village's parks are freely available for unattended displays and other uses by other private groups. Under such circumstances, as the Court of Appeals concluded, "no *reasonable* person will draw an inference that the Village supports any church, faith or religion associated with the display of a creche during the Christmas season at Boniface Circle" (Pet. 22a) (emphasis added).*

The Village argues erroneously that the creche was permissible in *Lynch* only because it was surrounded by reindeer, teddy bears and the like. But this Court held in

---

* *See also Lehman* v. *City of Shaker Heights*, 418 U.S. 298, 321 (1974) ("The endorsement of an opinion expressed in an advertisement on a motor coach is no more attributable to the transit district than the view of a speaker in a public park is to the city administration or the tenets of an organization using school property for meetings is to the local school board.") (dissenting opinion) (citation omitted); *cf. O'Hair* v. *Andrus*, 613 F.2d 931, 934 (D.C. Cir. 1979) (erection of Papal altar and conduct of Papal Mass on National Mall is constitutionally permissible, for where public property is openly available to all, "there is no 'establishment of a religion,' and there cannot be a meaningful perception of one").

Lynch that "the focus of our inquiry must be on the creche in the context of the Christmas season." 104 S. Ct. at 1362. *See id.* at 1358. The constitutional focus was not upon a head count of Pawtucket's reindeer and teddy bears. The Court concluded that

> To forbid the use of this one passive symbol—the creche—at the very time people are taking note of the season with Christmas hymns and carols in public schools and other public places, and while the Congress and Legislatures open sessions with prayers by paid chaplains would be a stilted overreaction to our history and to our holdings. *Id.* at 1365.

Here, too, the focus must be the creche in the context of Scarsdale's observation of the Christmas season.

For the entire month of December, Christmas is celebrated in Scarsdale's parks and streets. The Chamber of Commerce and the Arthur Manor Association display (with Village permission) Christmas lights and ornaments on Village-owned light standards and trees in Boniface Circle and Davis Park (J.A. 50-51, 53-54). The Village permits the Chamber of Commerce to pipe in recorded Christmas music in the decorated Boniface Circle area for the entire month of December (J.A. 50-51). The Village itself decorates Christmas trees at Village Hall (J.A. 53).

Christmas carols are sung in Boniface Circle on Village-owned platforms and amplified by Village-owned loudspeakers (J.A. 50-51; Pet. 44a-45a) before an evergreen tree now decorated with Christmas trimmings by the Village (J.A. 53). Santa Claus arrives on one of the Village's fire trucks (J.A. 52). The carolers sing not only ***Rudolph The Red-Nosed Reindeer***, but also devotional Christmas hymns which celebrate the birth and divinity of Jesus Christ (J.A. 52-53, 231-37).

Neither logic nor a sense of our nation's pluralistic history and tradition requires the Village to prohibit the Creche Committee from temporarily displaying its creche—a traditional Christmas symbol—in the same public park in which carolers sing

> O COME ALL YE FAITHFUL,
> JOYFUL AND TRIUMPHANT
> O COME YE, O COME YE TO BETHLEHEM!
> COME AND BEHOLD HIM, BORN THE KING
> OF ANGELS!
> O COME LET US ADORE HIM,
> O COME LET US ADORE HIM
> O COME LET US ADORE HIM, CHRIST,
> THE LORD! (J.A. 233; *see* J.A. 231-40).

As the Court of Appeals said of Scarsdale's Christmas celebration,

> the Christmas celebration in the Village is not significantly different than the Christmas celebration described in *Lynch*. In Scarsdale, the Village is decorated with many traditional symbols of Christmas. Moreover, Boniface Circle has been the recent site of the Christmas Carol Sing and the site of numerous Christmas decorations (Pet. 22a-23a).

Petitioners' "divisiveness" argument must be considered almost frivolous in light of *Lynch*, where the Court said that "no inquiry into potential political divisiveness is even called for" in cases that do not involve a direct subsidy to church-sponsored schools or other religious institutions, 104 S. Ct. at 1364-65, *citing Mueller* v. *Allen*, 103 S. Ct. 3062, 3071 n.11 (1983), and Justice O'Connor wrote that "divisiveness" should not be an independent test of constitutionality, 104 S. Ct. at 1367. Moreover, "divisiveness" can

never justify the suppression of individual religious expression. As Justice Brennan said in *McDaniel* v. *Paty*, 435 U.S. 618, 640-41 (1978), where Tennessee sought to invoke "divisiveness" to bar a clergyman from public office,

> That public debate of religious ideas, like any other, may arouse emotion, may incite, may foment religious divisiveness and strife does not rob it of constitutional protection. . . . The State's goal of preventing sectarian bickering and strife may not be accomplished by regulating religious speech and political association. . . . Religionists no less than members of any other group enjoy the full measure of protection afforded speech, association, and political activity generally. . . . [The Establishment Clause] may not be used as sword to justify repression of religion or its adherents from any aspect of public life (concurring opinion) (citations and footnote omitted).*

As a last resort, petitioners contend that even if the Establishment Clause does not dictate that they *must* exclude the creche, they nevertheless *may* do so. That contention directly contradicts the command of the Free Speech Clause that "Selective exclusions from a public forum may not be based on content alone, and may not be justified by reference to content alone." *Police Department of Chicago* v. *Mosley*, 408 U.S. 92, 96 (1972); *see also Widmar*, 454 U.S. at 267-70.

Petitioners apparently overlook this Court's mandate in *Widmar*, which necessarily directed the issuance of an

---

* *See also United States* v. *Ballard*, 322 U.S. 78, 87 (1944); Gaffney, *Political Divisiveness Along Religious Lines: The Entanglement of the Court in Sloppy History and Bad Public Policy*, 24 St. Louis U.L.J. 205 (1980).

injunction against the university's officials, an injunction which could leave no room for the exercise of discretion. Just as the University of Missouri had no discretion to deny the use of campus facilities for religious expression, Scarsdale's trustees have no discretion to deny the Creche Committee access to the Village's parks, particularly since they freely grant access to all others.

The Village's purported interest in "avoiding even near approaches to collisions with the Establishment Clause" (Pet. Br. 32) cannot override the guarantees of the Free Speech Clause. In *Widmar,* for example, the state urged that its discriminatory exclusion of religious speech from a public forum was justified by a compelling interest in protecting against a violation of the Missouri Constitution, which allegedly went further than the Federal Constitution in proscribing indirect state support for religion. The Court rejected that argument:

> On one hand, respondents' First Amendment rights are entitled to special constitutional solicitude. Our cases have required the most exacting scrutiny in cases in which a State undertakes to regulate speech on the basis of its content. On the other hand, the state interest asserted here—in achieving greater separation of church and State than is already ensured under the Establishment Clause of the Federal Constitution—is limited by the Free Exercise Clause and in this case by the Free Speech Clause as well. In this constitutional context, we are unable to recognize the State's interest as sufficiently "compelling" to justify content-based discrimination against respondents' religious speech. 454 U.S. at 276 (citations omitted).

Widmar held that the university *must* give students access to a public forum for the expression of religious views

and that the university's officials had no discretion under the Establishment Clause to exclude religious expression from the campus. Scarsdale's trustees can fare no better. *Lynch* demonstrates that the Establishment Clause does not require of communities like Scarsdale the charade of a sanitized Christmas observance.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

MARVIN SCHWARTZ
(Counsel of Record)
125 Broad Street
New York, New York 10004
(212) 558-4000

SARA GOODMAN
Attorneys for Respondents
The Scarsdale Creche Committee, et al.

December 29, 1984